the respondents had not discharged the burden even on a balance of probabilities and there should have been judgment for the appellant.

The appeal is, therefore, allowed with costs here and in the court below. Judgment will be entered for the appellant in the sum of $135,000 against both parties with interest thereon at 6% from April 7, 1971 to date of payment.

Appeal allowed.

Solicitors: *Battenberg & Talma; Yong & Co.*

HOCK HUA BANK BHD. v. SAHARI BIN MURID

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 10 & October 13, 1980]
[Kuching — Federal Court Civil Appeal No. 53 of 1980]

Practice and Procedure — Jurisdiction of judge to alter judgment regularly obtained and perfected — Judgment inter partes — Allegation of fraud — Judge functus officio — Fresh action necessary to set aside judgment — R.S.C., 1957, O. 28, r. 11 (R.H.C. 1980, O. 20 r. 11).

In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed.

Held: (1) the learned judge was *functus officio;*

(2) the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;

(3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;

(4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground of fraud.

Cases referred to:-

(1) *Evans* v. *Bartlam* [1937] A.C. 473.
(2) *Re St. Nazaire Co.* 12 Ch. D. 88.
(3) *Kelsey* v. *Doune* [1912] 2 K.B. 482.
(4) *Hession* v. *Jones* [1914] 2 K.B. 421.
(5) *Hip Foong Hong* v. *Neotia & Co.* [1918] A.C. 888.
(6) *Jonesco* v. *Beard* [1930] A.C. 298.
(7) *Smith* v. *Peizer* 65 S.J. 607.

FEDERAL COURT.

Peter Chin for the appellant.

Raymond Szetu for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is concerned with the jurisdiction of a judge to alter, vary or set aside a judgment regularly obtained, drawn up and perfected.

The order in question was an order for sale made in a foreclosure proceeding. The originating summons was duly served on the chargor, together with copies of the charge and the notice of demand under section 148 of the Land Code which were annexed to the affidavit in support as exhibits. The charge was to secure the repayment of a loan made to a firm known as the Tukang Firma Perabut dan Binaan and appeared to be executed by a Sahari as chargor before an advocate and solicitor practising at Miri. It is to be observed that the identity card number of the purported chargor was not recorded on the charge.

The respondent to the foreclosure proceeding filed an affidavit in which he denied that he executed the charge on the day claimed and asserted that he could not have done so since on that day he was out at sea on board a boat, heading towards Kota Kinabalu.

The respondent also averred that he had issued out a writ against the proprietor or partner of the firm and the chargee Bank for a declaration that his land was freed from the charge and for consequential reliefs and damages.

This claim of *non est factum* and the charges of fraud and forgery in the counter affidavit of the respondent notwithstanding, the judge after hearing counsel for both parties made the order of sale on June 13, 1978. That order was then drawn up and perfected. It was not appealed against but shortly before the expiry of a month from the date of the order which was the period for lodging an appeal, the respondent made an application to set it aside and he also asked for leave to file an affidavit in opposition. The purpose of the last prayer is not easily understood. He had filed an earlier affidavit in opposition. It was as full as could be desired, except perhaps he did not exhibit copies of the various ship's documents which would establish that he was not in Miri at the time when he was said to have executed the charge in Miri. However he did additionally allege a meeting with the attesting solicitor who confirmed, so it was alleged, that the respondent was not the person who executed the charge.

The summons to set aside the first order was set before the learned judge on September 26, 1978. Counsel appeared for both parties. The various affidavits were read. The judge made an order dismissing it. His reasons have not been stated anywhere. But the opposition to the second summons was not on the question of the judge's jurisdiction but it was contended that the summons was not in compliance, presumably, with the rules. Whether the refusal of the judge to set aside this order was on this procedural ground, it is not possible to say.

Then on December 18, 1979, this time by notice of motion, the respondent made another application to set aside the two previous orders on precisely the same grounds. Again affidavits and counter-affidavits were filed. On this occasion, however, the argument of counsel for the respondent succeeded and the learned judge set aside his own order.

He did not consider that he was *functus officio.* Nor that the application to set aside the order was made in the same proceedings and after the order had been drawn up. He did not appear to realise that the order was made on an inter-partes application. He

rejected the contention of counsel for the chargee that the only way to set aside such an order was by a fresh action if, *inter alia*, grounded on fraud. He thought that since the matter had not been adjudicated and the court had not pronounced a judgment upon the merits or by consent, he had the power to do what he did. He gave as his authority the case of *Evans* v. *Bartlam*[1] and he cited the oft-quoted dictum of Lord Atkin therein on a judgment obtained by a failure to follow any of the rules of procedure.

But though he himself observed that in this dictum Lord Atkin was discussing the jurisdiction of the judge to set aside a judgment obtained by default, he failed to see that in this case the order was not obtained because of the default of the other party. He had the same material before him at the first foreclosure proceeding and quite clearly he should have considered himself *functus officio* after having considered the contentions raised at this proceeding and refused to do anything about it on the ground of lack of jurisdiction and he should have left it to the respondent to commence a fresh action to set aside the foreclosure order on the ground of fraud. The right practice was pointed out to him and his attention was drawn to the cases directly in point. Unless he could distinguish them, he was bound by them.

Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St. Nazaire Co.*,[2] *Kelsey* v. *Doune*;[3] *Hession* v. *Jones*,[4] unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong* v. *Neotia & Co.*[5] and *Jonesco* v. *Beard*.[6] The hearing of the action will in a proper case be expedited: *Smith* v. *Peizer*.[7]

For these reasons, we allowed the appeal with costs and restored the original order made in the foreclosure proceeding.

We have observed that the fresh action necessary to set aside the order on the ground of fraud has been commenced. All that the respondent requires are a stay of the foreclosure proceeding and an expedition of the hearing of the fresh action.

Fortunately for the respondent, we have been able to overcome the reluctance of counsel for the chargee and to prevail on him to agree to a stay. This would save the solicitors for the chargor having to make the application to the court.

The Chief Justice, Borneo assures the parties that he will entertain an application for an early date of hearing when the pleadings close and all the pre-trial procedures have been taken.

Appeal allowed.

Solicitors: *Wan Ullok, Jugah, Chin & Co.; Szetu & Co.*

YAP EE KONG & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) Wan Suleiman F.J., Abdul Hamid F.J. & Hashim Yeop A. Sani J.) November 17, 1980]

Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1980]

Criminal Law and Procedure — Conviction on evidence of accomplice — Corroboration — Reference to Federal Court — Hearing as an appeal — Penal Code, s. 193 — Courts of Judicature Act, 1964, s. 66(1).

In this case the appellants were charged in the Sessions Court with abetting the offence of perjury under section 193 of the Penal Code allegedly committed by one Othman bin Ahmad. At the trial Othman bin Ahmad gave evidence on the alleged influence of the appellants to "tell lies in court." In support of his evidence the prosecution called the wife of Othman bin Ahmad and the superior officer of Othman, who both gave evidence of statements made by Othman to them. The learned President of the Sessions Court held that the defence had cast reasonable doubt on the prosecution case and he acquitted the appellant but on an appeal by the Public Prosecutor the learned judge of the High Court convicted the appellants as he found that the superior officer of Othman was an independent witness and his evidence corroborated that of Othman. Application was made to the learned judge to reserve for the decision of the Federal Court questions of law of public interest which had arisen in the course of the appeal but this was refused. Application was then made by way of criminal reference to the Federal Court, which heard the application and dealt with the matter as on appeal. The question considered by the Federal Court in relation to the first appellant was "whether corroboration is provided by proof of consistent statements made out of court before trial." In relation to the second appellant the question was "Where a person is charged with abetting an offence under section 193 of the Penal Code can the evidence of an accomplice be corroborated by what the accomplice is alleged to have told his wife or his superior officer after the offence had been committed?"

Held: (1) the evidence against the second appellant was based on the bare statement of an accomplice and it was a serious misdirection on the part of the appellate judge to consider the previous statement of an accomplice as corroboration;

(2) as regards the first appellant there was hardly any evidence against him in the first place and the question of corroboration did not arise;

(3) on the facts of the case the answers to both the questions posed must be in the negative. It followed that the convictions recorded by the appellate judge against both the appellants should be quashed.

Cases referred to:-

(1) *Sim Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200.

(2) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.

(3) *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349.

(4) *R.* v. *Baskerville* [1916] 2 K.B. 658.

(5) *Reg.* v. *Malapa Bin Kapanu & Ors.* I.L.R. [1874] B. 196, 197.

(6) *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296, 315.

FEDERAL COURT.

E. Joseph Jr. (*G.S. Nijhar* with him) for the 1st appellant.

R.R. Chelliah (*G. Sri Ram* and *P. Vijendran* with him) for the 2nd appellant.

Shaik Daud bin Haji Mohamad Ismail (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.